Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

80-531

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERENICE T. SCHNEIDER,

Petitioner,

v.

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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September 26, 1980

QUESTIONS PRESENTED

1. Whether respondents should be permitted to invite an error by blocking petitioner's efforts to seek clarification of an ambiguity in the jury verdict before the jury was dismissed (following a five-week trial) and then be rewarded for their effort by obtaining a reversal of the judgment because of the ambiguity in the jury verdict.

2. Should court congestion be exacerbated by encouraging counsel to cause errors in the trial court and then win reversals based on those induced errors.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Berenice T. Schneider v. Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company and Robert J. Campbell, Nos. 78-2606, 78-2607, 78-2759, below.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) and the opinion of the court of appeals denying rehearing (Appendix B) are not yet reported. The judgment of the district court (Appendix C) and the jury verdict (Appendix D) are attached hereto.

JURISDICTION

The judgment of the court of appeals for the ninth circuit was entered on June 30, 1980. A timely petition for rehearing with the suggestion that rehearing be en banc was denied on September 4, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The plaintiff in this proceeding and the petitioner herein, Berenice T. Schneider, a widow, was induced by defendants to make a series of substantial investments in several small companies. As a result, plaintiff lost well over one-half million dollars and subsequently brought suit against multiple defendants under the federal securities laws and pendent state claims for material misrepresentations and non-disclosures. Following a five-week jury trial, the jury awarded plaintiff verdicts totaling $471,000 in general damages and $15,000 in punitive damages, separately stating the verdicts as to each defendant (see Appendix D). Prior to the dismissal of the jury, petitioner's counsel attempted to seek clarification of a possible ambiguity in the jury verdict, but his efforts were blocked by respondents and the trial court entered the judgment in the same form as the jury verdict.

On June 30, 1980 the ninth circuit re-

versed petitioner's judgment against respondents on the grounds that the court found that the jury verdict was "hopelessly ambiguous" (Court's Memorandum of Decision, p. 2). The court went on to point out that it was unable to determine what the total amount was that the jury intended to find against defendants (Court's Memorandum of Decision, pp. 3, 4). The court thus focused on the very problem that petitioner's attorney attempted to clarify before the jury was dismissed, only to be blocked from doing so by respondents' objections. A brief summary of the relevant facts are as follows:

SUMMARY OF RELEVANT FACTS.

1. Defendants were sued for securities fraud and common law fraud for multiple events occurring at different times. They were sued both on a conspiracy theory and for independent liability and, accordingly, no joint and several jury instruction was requested by plaintiff, nor was any joint and several instruction requested by defendants.

2. Plaintiff's requested jury verdict form included an interrogatory requesting the jury to state the total amount of any damages it found (Clerk's Transcript, "CT",

pp. 1681-1682), but the court did not use plaintiff's form.

3. During jury deliberations, the jury submitted a note stating that it did not believe it had a verdict form that would permit a mixed verdict (Transcript of Instructions, "TOI", pp. 37-38). The next morning, in light of the jury foreman's question concerning the verdict form, plaintiff's attorney requested that the court submit a question to the jury which asked: "Do you find that plaintiff has been damaged? Please state the total amount of such damages" (TOI, p. 42). Plaintiff's attorney explained to the court that the request for the total amount of damages was necessary because the jury might return a verdict in differing amounts and there would be no way to know if the jury found it was a joint tortfeasor situation as differentiated from independent liability (TOI, pp. 42-43).

4. The court responded that if that happened, "all we have to do is add them up if you recover" (TOI, p. 43). Counsel for Bowes and Campbell remained silent concerning this remark, but both did object to the clarifying question sought by plaintiff

and the court then refused plaintiff's request. Plaintiff then asked that if the jury came back with a split amount that the court ask the jury what the total amount of damages was (TOI, p. 45). The court agreed to wait to see what would happen (TOI, p. 45).

5. The jury then came in with separate verdicts in different amounts as to different defendants (see Appendix D). Before the jury was dismissed, plaintiff's counsel again requested that the court submit the special interrogatory to the jury asking them to state what the total amount of damages was (TOI, p. 57). Defense counsel again objected, the court then indicated, "Do you have an adding machine? We can add these up (TOI, p. 58)." Defense counsel were again silent with regard to the trial court's interpretation of the verdict (TOI, p. 58). The court then excused the jury without submitting the question to the jury.

6. Immediately after the dismissal of the jury, defense counsel began an attack on the jury verdict (TOI, p. 59).

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE NINTH AND THE EIGHTH CIRCUITS AND THE CALIFORNIA SUPREME COURT.

The decision below conflicts with a decision of the ninth circuit, one from

the eighth circuit and decisions of the California Supreme Court concerning the doctrine of invited error and waiver of errors in the form of a jury verdict where defendants did not object to the verdict form prior to the dismissal of the jury.

It has been the clear rule of the ninth circuit since at least 1957 that parties cannot seek a reversal based on errors which they invited. Thus, in Hudson v. Wylie, 242 F.2d 435 (9th Cir., 1957), the ninth circuit stated at page 448:

> "'Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.' 2 Cal. Jur. p. 846."

Similarly, in Arnott v. American Oil Co., 609 F.2d 873 (8th Cir., 1979), the court did not permit a defendant to reverse the judgment based on the form of the verdict where defendants failed to object or seek clarification when the verdicts were ren-

dered. The eighth circuit stated at page 889:

> "Under the circumstances the failure of Amoco to request any instruction or special interrogatories on damages or to make objection to the general verdict form results in a waiver of such objections on appeal. (citations omitted) Amoco also failed to object or seek clarification when the verdicts were rendered and therefore waived objection to the form of the verdict. See Tennessee Consol. Coal Co. v. United Mine Workers, 416 F. 2d 1192, 1200-1201 (6th Cir. 1969), cert. denied, 397 U.S. 964, 90 S.Ct. 999, 25 L.Ed.2d 256 (1970)." (emphasis added)

Finally, as the issues involved are important questions of state law, the decision of the California Supreme Court is highly relevant. In Brown v. Regan, 10 C.2d 519, 524 (1938) the California Supreme Court stated at page 523:

> "It is well established by numerous authorities that when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition

failed to make any request that its informality or uncertainty be corrected."

Further, at page 524, the California Supreme Court stated:

"It creates an abiding conviction that the matter was permitted to stand as originally returned by the jury with the view of thereafter reaping a technical advantage that might result by reason of the situation. We think there is no question that attorney for appellant waived the defect in the verdict, and is estopped to rely upon such defect in the verdict upon this appeal."

(emphasis added)

B. COURT PROTECTIVE RULES.

The doctrine of invited error and waiver of defects in a jury verdict are important court protective rules that, unless enforced, would encourage litigants to invite errors and further increase court congestion by requiring retrials of numerous cases.

In this time of highly congested court calendars, it is more important than ever that litigants not be encouraged to create errors in the hope of reversing a judgment and thereby obtaining a second trial.

ARGUMENT

Unless the long-standing rule of invited error and its corollary, waiver of defects in a jury verdict not objected to, are enforced, litigants will be encouraged to invite errors and then seek a reversal and a second trial based on their own induced error. Not only does this work a substantial injustice to litigants, but it greatly adds to the already overburdened court system (in this case alone, another five-week trial would be required if the decision of the ninth circuit is not reversed).

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment of the ninth circuit.

Respectfully submitted,
GARY S. ELSTER, A Professional Corporation

Gary S. Elster
Counsel for petitioner

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Filed--June 30, 1980
Richard H. Deane, Clerk
U. S. Court of Appeals

Berenice T. Schneider, Plaintiff/Appellee, v. Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company, Defendants/Appellants.	No. 78-2606 D.C. No. 75-0524-S
Berenice T. Schneider, Plaintiff/Appellee, v. Robert J. Campbell, Defendant/Appellant.	No. 78-2607 D.C. No. 75-0524-S
Berenice T. Schneider, Plaintiff/Appellee, v. Kenneth G. Braid, Defendant/Appellant.	No. 78-2682 D.C. No. 75-0524-S

Berenice T. Schneider, Plaintiff/Appellant, v. Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company, Defendants/Appellees.	No. 78-2759 D.C. No. 75-0524-S MEMORANDUM

Appeal from the United States District Court of the Southern District of California

Before: ALARCON, NELSON, Circuit Judges, and JAMESON, District Judge.*

These appeals arise out of the collapse of three corporations, The Plastics Group ("TPG"), PPAR Systems ("PPAR"), and Dmytryk-Boyd Productions, Inc. ("Dmytryk"). Plaintiff invested (and lost) several hundred thousand dollars in these enterprises and, as a result, sued those who led her to make these investments for violations of Rule 10b(5) of the Securities and Exchange Commission. Pendent to the 10b(5) claims are actions for common law fraud, conspiracy,

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*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

and breach of fiduciary duty and confidential relationship.

After a jury trial, three of the defendants were held liable--Bowes, Campbell, and Braid. In addition, the jury awarded Schneider damages against three corporations wholly owned by Bowes. Each appeals the judgment. We reverse the judgment against Braid because of insufficiency of the evidence. We reverse the judgment against Campbell, Bowes, and the corporations, because we find the jury verdict hopelessly ambiguous.

I. Sufficiency of the Evidence

Braid argues that insufficient evidence was introduced against him to warrant the submission of the question of their liability to the jury. We have examined the trial transcript and find the evidence insufficient to support the judgment against Braid. Schneider only alleged Braid's involvement in Dmytryk-Boyd, and did not assert that he had deliberately defrauded her. She did not meet her burden of showing that Braid owed her a legal duty, that he breached this duty, and that she had suffered damages as a result.

II. The Jury Verdict

The trial court must interpret a verdict in light of the pleadings, the evidence and the instructions. If it interprets the verdict incorrectly and the verdict is capable of a correct interpretation, we as an appellate court have the power to make such an interpretation. Mixon v. Riverview Hospital, 62 Cal. Rptr. 379, 389 (App. 1967). Nevertheless, we have no power to make a judgment that does not conform to the intention of the jury. Telles v. Title Insurance & Trust Co., 83 Cal. Rptr. 444, 449 (App. 1969).

From our examination of the jury verdict and the trial transcript, we find the damage award hopelessly ambiguous. In such a case, a reversal is required. Hallinan v. Prindle, 220 Cal. 46 (1934); Mixon v. Riverview Hospital, 62 Cal. Rptr. at 388. The trial court interpreted the jury verdict as a separate judgment against each of the defendants, including the corporate defendants whose liability derives solely from the acts of another defendant. Such an interpretation of the verdict cannot stand, because derivative liability is necessarily

joint and several. See Tri-Delta Engineering, Inc. v. Insurance Co. of North America, 146 Cal. Rptr. 14, 18 (App. 1978). We find it impossible, however, to interpret the verdict, given the record we now have before us. The jury was given no instruction on joint and several liability, and thus it is unclear when they returned with a $77,000 damage award against Bowes and a $76,000 award against each of his corporations, whether the jury intended to find Bowes and his corporations together liable for approximately $76,000, or whether it intended to find them liable for $305,000.

Moreover, it is not clear that when the jury awarded damages of $120,000 against Campbell it found that Campbell had committed separate tortious acts against Schneider and thus was separately liable for the whole amount or whether it found that Campbell had participated in the same tortious acts, in which case the damage award against him should have been joint and several and for the same amount as against Bowes. Of course, some intermediate position would also be possible. We recognize that a jury verdict should stand

whenever any reasonable interpretation of the record will support it, but under the peculiar facts of this case, we find no such interpretation and are therefore constrained to reverse.

III. Issues Affecting the New Trial

Liability of the Bowes Corporations. We note for purposes of the new trial that the jury instruction on the liability of the Bowes Corporations was fatally defective. We find the alter ego instruction defective because it allowed the jury to conclude that the corporations were liable for a tort committed by Bowes without finding an abuse of the corporate form. For a corporation to be liable for the torts of its owner, a plaintiff must show both a unity of interest and ownership such that the separate personalities of the corporation and the individual no longer exist and also that the corporate form itself was employed as a device to perpetrate the fraud. United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977).

The TPG Release. Bowes and Campbell assert that Schneider executed a release

that bars any claim she has for her losses from her investments in TPG and that the District Court committed reversible error in submitting this question to the jury. We note that the submission of this question to the jury by the District Court was not a reversible error. The jury could infer that although Schneider was aware of the losses TPG suffered by the time she executed the release, she erroneously thought that Bowes and Campbell only learned of the financial condition of TPG at the same time she did. The jury could infer that Schneider executed the release against Bowes and Campbell only because she did not know that they had always known the financial condition of TPG and had violated a legal duty to tell her about it. If the release were in fact induced through misapprehension on the part of Schneider caused not by her own neglect but by misconduct by Bowes and Campbell, it would not have been binding. Moore v. Rogers, 157 Cal. App. 2d 192 (1958); see Gelfand v. Tanner Motor Tours, Ltd., 450 F.2d 786, 788 (2d Cir. 1971); Carpenter International, Inc. v. Kaiser Jamaica Corp., 369 F. Supp. 1138, 1143 (D. Del. 1974).

Therefore, the question of the effectiveness of the release was properly submitted to the jury.

IV. Prejudgment Writ of Attachment

If Bowes had been a California resident, the District Court could not have issued a prejudgment writ of attachment against him, because Schneider's action was not for a liquidated amount. Cal. Civ. Proc. Code §§ 537.1 to .2 (repealed 1977). Bowes argues that the writ should not have been issued against him because the California prejudgment writ of attachment statute then in effect treated nonresidents the same as a residents (sic), once they made a general appearance. After studying the legislative history of this act and its successor, see Cal. Civ. Proc. Code § 492.050(c), we agree that the statute does not distinguish between the two, despite the contrary inference that might be drawn from § 537.2. In interpreting the statute, we are mindful that a state cannot treat residents differently from nonresidents without at least some justification. U.S. Const. art. IV, § 2. We therefore conclude that the prejudgment writ of attachment was improperly

issued. We find further that the preliminary injunction requiring Bowes to bring his stock certificates to California and prohibiting his selling or transferring the real property of Bowes-Elgin and Bowes-Dundee was made in aid of the attachment and should therefore be vacated.

V. Schneider's Cross-Appeal

Schneider's cross-appeal is mooted by our reversal of the judgment against Bowes and his corporations. We emphasize again, however, that the corporations are jointly liable for the torts of Bowes, if they are liable at all, regardless of whether an agency theory or an alter ego theory is used.

VI. Conclusion

The judgments against the defendants are reversed. We remand the case to the District Court for a new trial against Bowes, Campbell and the corporate defendants. We also instruct the District Court to vacate the preliminary injunctions and to release the attachments.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed--September 4, 1980
Richard H. Deane, Clerk
U. S. Court of Appeals

Berenice T. Schneider, Plaintiff-Appellee, v. Thomas D. Bowes, et al, Defendants-Appellants.	No. 78-2606 Consolidated with No. 78-2607 No. 78-2682 No. 78-2759 DC# 75-0524-S

ORDER

Before: ALARCON and NELSON, Circuit Judges, and JAMESON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Alarcon and Nelson have voted to reject the suggestion for a rehearing en banc and Judge Jameson has recommended against rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a

*Honorable William J. Jameson; Senior United States District Judge, District of Montana, sitting by designation.

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Filed--February 27, 1978
D. Harris, Deputy Clerk
U.S. District Court
Southern District of California

Berenice T. Schneider, Plaintiff, v. Thomas D. Bowes; Bowes Management Company, Inc.; Bowes Dundee Realty Co., Inc.; Bowes Elgin Realty Co., Inc.; Robert J. Campbell; and Kenneth G. Braid, Defendants.	Civil No. C75-0524-S

JUDGMENT ON JURY VERDICT

The above-entitled cause having come on for trial before the Court and a jury of six, and the issues having been duly tried and the jury having rendered its verdict, NOW, THEREFORE, IT IS

ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Thomas D. Bowes the sum of $77,000.00 actual damages and $10,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Management Company, Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Dundee Realty Co., Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Elgin Realty Co., Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Robert J. Campbell the sum of $126,000.00 actual damages and $4,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Kenneth G. Braid the sum of $40,000.00 actual damages and $1,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the defendant Thomas D. Bowes take nothing by his counter-claim and that he go hence without day; it is

FURTHER ORDERED that the parties shall

bear their own cost of action expended herein.

Dated this 27th day of February, 1978.

Signed: Ewing T. Kerr

U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Berenice T. Schneider, Plaintiff, v. Thomas D. Bowes; Bowes Management Company, Inc.; Bowes Dundee Realty Co., Inc.; Bowes Elgin Realty Co., Inc.; Robert J. Campbell; and Kenneth G. Braid, Defendants.	Civil No. C75-0524-S

V E R D I C T

We, the jury duly empaneled in the above-entitled matter, upon the issues joined, do find generally for the plaintiff and against the defendants and assess her damages as follows:

	DAMAGES	PUNITIVE DAMAGES
THOMAS D. BOWES	$77,000.00	$10,000.00
BOWES MANAGEMENT COMPANY, INC.	$76,000.00	None
BOWES DUNDEE REALTY CO., INC.	$76,000.00	None
BOWES ELGIN REALTY CO., INC.	$76,000.00	None

ROBERT J. CAMPBELL	$126,000.00	$4,000.00
KENNETH G. BRAID	$40,000.00	$1,000.00

February 6, 1978 /s/ John P. Snodgrass
Foreman